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7 FAM 1200 APPENDIX B
U.S. SUPREME COURT DECISIONS ON LOSS OF NATIONALITY

(CT:CON-804; 04-30-2018)
(Office of Origin: CA/OCS)

7 FAM 1210 APPENDIX B INTRODUCTION

(CT:CON-285; 03-06-2009)

The United States Supreme Court has considered the issue of loss of nationality many times. Statistically speaking, the Court has agreed to hear a much higher percentage of citizenship cases brought to its attention compared, for example, to criminal or tax law.

7 FAM 1220 APPENDIX B THE NINETEENTH CENTURY

(CT:CON-285; 03-06-2009)

U.S. v. Wong Kim Ark, 164 U.S. 644 (1898). This U.S. Supreme Court case held that Congress had no power to restrict the acquisition of citizenship conferred at birth in the United States; a person born in the United States of Chinese citizen parents was a U.S. citizen under the Fourteenth Amendment and therefore not subject to the Chinese Exclusion Act; and although Wong Kim Ark could "renounce this citizenship and become a citizen of... any other country," he had never done so. Conduct constituting renunciation of citizenship was not defined. This was the law until the Expatriation Act of 1907 took effect.

7 FAM 1230 APPENDIX B THE 1950'S

(CT:CON-789; 02-16-2018)

a. On January 9, 1950, in the matter of Savorgnan v. United States et al., 338 U.S. 49 (1950), the U.S. Supreme Court held that a native-born American citizen who, in the United States, became an Italian citizen in 1940, and lived in Italy with her husband from 1941 to 1945, thereby lost her American citizenship even if, when she applied for and accepted Italian citizenship, she did not intend to give up her American citizenship.

b. On March 31, 1958, the U.S. Supreme Court ruled on three cases regarding loss of nationality. The decisions of that day demonstrated that on loss-of-nationality issues the Supreme Court had abandoned the Savorgnan precepts of the past and that every statute for involuntary expatriation was in jeopardy:

(1) Nishikawa v. Dulles, 356 U.S. 129 (1958). The case involved loss of nationality for service in the armed forces of a foreign state. It concerned a dual U.S.-Japanese citizen who had been held to have lost U.S. citizenship by serving in the Japanese army in World War II. The court deemed it unnecessary to reach the constitutional issue and ruled that the U.S. Government had not established, with the requisite certainty, that the military service was voluntary. The Court held that when the issue of voluntariness is raised, the U.S. Government has the burden of proving the voluntariness of the potentially expatriating act and must do so by clear, convincing, and unequivocal evidence. Largely as a result of this decision, Congress enacted Section 349(c) INA creating a rebuttable presumption that a potentially expatriating act was performed voluntarily. Congress thereby modified the Court’s decision concerning the burden-of-proof requirement in loss-of-nationality cases;

(2) Perez v. Brownell, 356 U.S. 44 (1958). (SUBSEQUENTLY OVERRULED by Afroyim v. Rusk). This case concerned the loss of nationality by a native born U.S. citizen who had voted in a political election in Mexico. The constitutionality of the statute was upheld, but only by a five-to-four vote. The majority opinion written by Justice Frankfurter extensively reviewed the historical background, finding that the power to prescribe loss of nationality emerged from the power to conduct foreign affairs and the Necessary and Proper Clause of the Constitution. However, since Congress cannot act arbitrarily, there had to be a ''rational nexus'' or ''relevant connection'' between such power and the means chosen to effectuate it. Loss of nationality was found to conform to this standard of reasonableness, inasmuch as the termination of the citizenship of a person who becomes involved in the political affairs of a foreign nation reasonably implemented the government's power to conduct foreign affairs. The dissenting opinion of Chief Justice Warren found that ''under our form of government, as established by the Constitution, the citizenship of the lawfully naturalized and the native born cannot be taken from them.'' The Chief Justice recognized that citizenship could be lost by voluntary renunciation or ''by other actions in derogation of undivided allegiance to this country.'' Another dissenting opinion filed by Justice Douglas, with Justice Black concurring, declared that citizenship ''may be waived or surrendered, but I see no constitutional method by which it can be taken from him'';

(3) Trop v. Dulles, 356 U.S. 86 (1958). In this case the Supreme Court for the first time struck down a loss-of-nationality statute. This statute provided for loss of nationality upon conviction for desertion from the armed forces of the United States during time of war. In this decision the vote was again five-to-four, and Chief Justice Warren's plurality opinion, speaking for the four dissenters in Perez, found this a penal statute, improperly visiting cruel and unusual punishment since it had left the expatriated citizen stateless. Justice Brennan's swing vote was explained in a concurring opinion, concluding that the loss-of-nationality penalty was not rationally related to a demonstrated national need. The four dissenters comprised the remainder of the Perez majority, and found the statute a reasonable and constitutional measure. This rendered Section 401(g) of Nationality Act of 1940 (54 Statutes at Large 1137), as amended, and INA Section 349(*b*)(x) invalid.

7 FAM 1240 APPENDIX B THE 1960'S

(CT:CON-378; 06-08-2011)

a. Five years later, in another five-to-four vote, the Court invalidated a statute prescribing loss of nationality as a consequence for evading military service. The majority opinion of Justice Goldberg in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) deemed the statute punitive and found it defective because the penalty was imposed without observing the constitutional safeguards relating to penal sanctions. This rendered INA Section 349 (a)(10) and Section 401(j) NA unconstitutional.

b. The following year another loss of citizenship statute was demolished in Schneider v. Rusk, 377 U.S. 163 (1964). There the law provided for expatriation of a naturalized citizen who resided in his native country for a continuous period of years. A five-to-three majority vitiated INA Section 352 (a)(1) as an invalid discrimination against naturalized citizens. This rendered INA Section 352 unconstitutional.

c. Afroyim v. Rusk, 387 U.S. 253 (1967). The U.S. Supreme Court declared Section 401(e) NA unconstitutional. This section had held that U.S. citizens expatriated themselves by voting in foreign political elections. Afroyim went beyond Section 401(e) and established the rule that a U.S. citizen has a constitutional right to remain a citizen "unless he voluntarily relinquishes that citizenship." Because of this decision, which was retroactive in effect, most of the substantive analysis in loss-of-citizenship cases now requires a judgment as to whether a person intended to relinquish U.S. citizenship at the time of committing the potentially expatriating act. This rendered Section 401(e) of the Nationality Act of 1940, and INA Section 349(a)(6), as originally enacted, unconstitutional under the Fourteenth Amendment. In Afroyim, the Court overruled Perez v. Brownell, 356 U.S. 44, 2 L. Ed. 2d 603, 78 S. Ct. 568 (1958), and rejected the latter's idea that "Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent."

d. See 7 FAM 1215 (chart) for a summary of grounds for potential expatriation, including a list of impermissible bases for loss of citizenship invalidated by the Supreme Court.

7 FAM 1250 APPENDIX B 1980: THE TERRAZAS DECISION

(CT:CON-285; 03-06-2009)

a. In 1980, in the matter of Vance v. Terrazas, 444 U.S. 252 (1980), the U.S. Supreme Court upheld the constitutionality of Section 349(c) INA establishing a rebuttable presumption that a potentially expatriating act was voluntary. The U.S. Government tried to persuade the Court that some voluntary acts are so inconsistent with retention of American citizenship that they may result, automatically, in loss of nationality. The Court disagreed, noting that "it is difficult to understand that 'assent' to loss of citizenship would mean anything less than an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proved conduct."

b. The Court elaborated on its opinion in Afroyim, stating that “the trier of fact must... conclude that the citizen not only voluntarily committed the expatriating act proscribed in the statute, but also intended to relinquish his citizenship.”

c. Under the Afroyim rationale, the Terrazas court added that “one is not free to treat the expatriating acts specified in (the statutes) as the indispensable voluntary assent of the citizen.”

d. The Court concluded: “In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.”

e. The Court noted that a person’s intent to relinquish U.S. citizenship could be discerned not only from the person’s words but as a fair inference from proven conduct. The consular officer and the Department perform this latter task in developing loss cases, though as a matter of practice, the Department generally requires a verbal expression of will to relinquish citizenship in order to find loss.

7 FAM 1260 APPENDIX B POST-TERRAZAS: THE 1980’S

(CT:CON-285; 03-06-2009)

a. In 1985, in Richards v. Secretary of State, Department of State (1985, CA9 Cal) 752 F2d 1413 the U.S. Court of Appeals, 9th Circuit held that Richards’ naturalization in Canada and taking of an oath renouncing all allegiance and fidelity to a foreign sovereign resulted in a knowing loss of citizenship. The Court ruled that “a United States citizen effectively renounces citizenship by performing act that Congress has designated an expatriating act only if he means the act to constitute a renunciation of his U.S. citizenship. In the absence of such an intent, he does not lose his citizenship simply by performing expatriating act, even if he knows that Congress has designated the act an expatriating act. By the same token, we do not think that knowledge of expatriation law ... is necessary, ... and a person who performs an expatriating act with an intent to renounce his US citizenship loses his U.S. citizenship whether or not he knew that act was expatriating act.” The Court ruled that Congress is without power to provide that citizens lose their citizenship by mere performance of specified acts; a person loses citizenship if he voluntarily performs an expatriating act enumerated by Congress and if, in performing the act, he intends to relinquish citizenship.

b. In 1987, in Meretsky v. U.S. Department of Justice, et al., 259 U.S. App. D.C. 487; 816 F.2d 791 (1987), the U.S. Court of Appeals for the District of Columbia upheld the ruling of the District Court, which affirmed the Department of State's issuance of a Certificate of Loss of Nationality ("CLN") against Meretsky, concluding that appellant had voluntarily and intentionally renounced his U.S. citizenship in order to become a citizen of Canada. Meretsky appealed his loss of citizenship to the Board of Appellate Review, which affirmed the State Department's conclusion that Meretsky had performed an expatriating act "with the intent to relinquish citizenship." Meretsky then brought an action in Federal district court under 8 U.S.C. 1503, seeking a declaratory judgment that he had not indeed lost his U.S. citizenship. Finding no material facts in dispute, and on cross motions for summary judgments, on December 30, 1985 the court upheld the issuance of the CLN. The

Ninth Circuit rejected an argument that the appellant had become a Canadian citizen to avoid economic hardship, ruling “[t]he cases make it abundantly clear that a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more money, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship.”

c. In 1987, in Kahane v. Shultz (1987, ED NY) 653 F Supp 1486, the U.S. District Court for the Eastern District of New York ruled that a United States citizen with dual citizenship in Israel did not intend to relinquish his U.S. citizenship when he committed expatriating act of accepting a seat in the Israeli Knesset, where acts and statements emphasize beyond doubt that the individual wanted to remain an American citizen, such intent being manifested both before and after he joined Israeli Parliament.

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